JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 705 68

BRUCE A. MACKEY,

Petitioner,

vs.

SEARS ROEBUCK & CO., a New York corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BRUCE A. MACKEY,
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vs.

SEARS ROEBUCK & CO., a New York corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAY IT PLEASE THE COURT:

Petitioner, Bruce A. Mackey, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit affirming the judgment of the District Court for the Northern District of Illinois dismissing Count I of petitioner's complaint for failure to state a claim upon which relief can be granted.

OPINIONS BELOW.

The opinion of the District Court (R. 22-35), as amended (R. 35-36), is not officially reported. The opinion of the Court of Appeals is reported at 237 F.2d 869. Both of these opinions are set forth in Appendix A to this peti-

tion. Prior opinions of this Court and of the Court of Appeals sustaining appellate jurisdiction are reported at 351 U.S. 427 and 218 F.2d 295.

JURISDICTION.

The jurisdiction of the Court of Appeals to review the judgment of the District Court dismissing less than all of the claims presented by the complaint was sustained by this Court in 351 U.S. 427 (No. 34, O. T. 1955). The judgment of the Court of Appeals was entered on November 1, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. §1254. Federal jurisdiction of Count I is based on 15 U.S.C. §15.

QUESTIONS PRESENTED.

1. Whether the predatory conduct of a single large firm—not alleged to possess a monopoly—is prohibited by the Sherman Act.

2. Whether a violation of Section 3 of the Robinson-Patman Act gives rise to a private action.

STATUTES INVOLVED.

Sections 1 and 4 of the Clayton Act, 38 Stat. 730, 731; Section 3 of the Robinson-Patman Act, 49 Stat. 1528; and Sections 1 and 2 of the Sherman Act, 26 Stat. 209, are quoted in Appendix B to this petition.

STATEMENT.

The questions presented by this petition are raised by the allegations of Count I of the complaint, in which petitioner claims treble damages under the antitrust laws. The District Court held the allegations insufficient, dismissed Count I without leave to amend, and entered a final judgment which has been affirmed by the Court of Appeals. (R. 36-38; 55) It is the affirmance of that judg-

ment which this petition seeks to review. The claims made in the other counts of the complaint (four of which are at issue in the trial court, and one of which was abandoned) are not involved here. The following facts are alleged:

Petitioner, Bruce A. Mackey, is the sole shareholder of Time Saver Tools, Inc. and is the former owner and successor in interest of General Metalcraft Company. Metalcraft and Time Saver were both engaged in interstate commerce, the former as a manufacturer and vendor of nursery lamps, and the latter as a manufacturer and vendor of tools (R. 3-4).

Sears Roebuck & Co., a New York corporation, is the defendant (R. 4). The tremendous volume of Sears' purchases and sales gives it the power to ignore normal business considerations, such as the probability of making a profit out of a particular transaction, in determining its policies with respect to purchases or sales of particular products in particular areas. It has the power, by means of actual or threatened refusals to deal with particular suppliers in particular areas, or by means of actual or threatened sales of particular products in particular areas at unreasonably low prices, substantially to destroy the business and property of its small competitors and its small suppliers. Sears has exercised its power against suppliers who have refused to do business on Sears' terms (R. 4-5).

In 1949 Sears demanded a price concession from petitioner, and threatened to ruin him if the demand was refused (R. 6). The demand was refused, and thereafter Sears has been engaged in a continuing plan to destroy each and every business in which Mackey has engaged or may attempt to engage (R. 5-6). The purpose and effect

of this plan has been to discipline small suppliers and small competitors of Sears and cause them to accept terms dictated by Sears when entering into business dealings with Sears (R. 5, 8-9). Competition among persons who supply products of the kind which Sears purchases for resale in its stores has thereby been materially and unreasonably restrained (R. 9).

Pursuant to its plan, Sears sold lamps at a fraction of its own cost in the cities in which petitioner sought to market lamps, though not elsewhere (R. 6-7); threatened a third party with a boycott in order to induce it to refuse to deal further with petitioner (R. 7); and, after deliberately copying petitioner's advertised tools and packaging, offered the copies for sale at a price below manufacturing cost (R. 7-8).

The District Court characterized Sears' conduct as "predatory" (R. 27). The Court of Appeals agreed with this characterization. It stated:

> " . . . We think Sears' conduct as alleged in the complaint was unreasonably anti-competitive in both purpose and effect . . . " 237 F. 2d at 874.

The District Court held that no violation of the Sherman Act or the Robinson-Patman Act was alleged. The Court of Appeals agreed that there was no violation of the Sherman Act—since the complaint does not allege that Sears is dangerously close to achieving a complete monopoly of the lamp market or the tool market—but disagreed with the basis of the District Court's decision with respect to Section 3 of the Robinson-Patman Act. On that point, the Court of Appeals expressly held "that a claim upon which relief can be granted is stated under Section 3 of the Robinson-Patman Act provided that a cause of action can exist under that section." Following its de-

cision in *Nashville Milk Company* v. *Carnation Company*, 238 F. 2d 86, on the same day, the Court held that a private action may not be maintained under Section 3 of the Robinson-Patman Act.

REASONS FOR GRANTING THE WRIT.

1. The Sherman Act question is important.

Group behavior which is unreasonably restrictive of competitive conditions is prohibited by the Sherman Act. *United States* v. *Standard Oil Co. of New Jersey*, 221 U.S. 1, 60-62 (1911); Report of the Attorney General's National Committee to Study the Antitrust Laws, p. 11. The Act applies even though the members of the group are affiliated corporations. *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947); *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F. 2d 79 (C.A. 7, 1949), see also 67 F. Supp. 626 at p. 634 (E.D. Ill. 1946); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). In each of the cases cited, the defendant corporations comprised a single business firm. No showing that the firm constituted a monopoly was necessary.

Analysis of these cases shows that the real vice in defendants' conduct lay not in the agreement among members of the same corporate family, but rather in the fact that each of the firms unreasonably interfered with the economic freedom of others. A & P viciously attacked the Streamline Markets in Pittsburgh (see 67 F. Supp. at 667) and abused its suppliers; the defendant-firm in *Kiefer-Stewart* employed a boycott as a means of disciplining its customers. See Report of the Attorney General's National Committee to Study the Antitrust Laws, 34-35; Rahl, Conspiracy and the Antitrust Laws, 44 Ill. L. Rev. 743, 766 (1950).

The Court of Appeals specifically stated that "Sears' conduct as alleged in the complaint was unreasonably anti-competitive in both purpose and effect . . . " 237 F. 2d at 874. Thus, if Sears had carried out its predatory program through affiliated corporations, instead of through different departments of the same corporation, it is quite clear that a violation would have occurred. Sears' defense rests on the fact that only a single corporation is guilty of unreasonable conduct.

The tradition of Sherman Act interpretation which has prevailed since the *Standard Oil* decision forecloses any such defense. The classic statement in the *Appalachian Coals* case is pertinent:

> " . . . The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purpose by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. . . . " *Appalachian Coals* v. *United States*, 288 U.S. 344, 359-360 (1933).

Section 2 of the Sherman Act employs the term "monopolize" to prohibit conduct by a single person that leads to the results condemned by Section 1. In the *Standard Oil* case itself, this Court expressly stated that the Rule of Reason applies to Section 2 as well as to Section 1 of the Sherman Act, and that the term "monop-

olize" was intended to proscribe actions which produce the restrictive consequences prohibited by Section 1. The Court said:

> "And a consideration of the text of the second section serves to establish that it was intended to supplement the first, and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded.
>
> * * *
>
> "Undoubtedly, the words 'to monopolize' and 'monopolize,' as used in the section, reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made, as it was intended to be, the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established

> law and by the plain duty to enforce the prohibition of the act and thus the public policy which its restrictions were obviously enacted to subserve. . . ." 221 U.S. at pp. 60-62.

See also, *United States* v. *American Tobacco Co.*, 221 U.S. 106, 180-181 (1911).

In his dissent in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400 (1904), Mr. Justice Holmes differentiated between restraints which members of a combination voluntarily impose upon their own trade, and involuntary restraints which were imposed upon strangers to the combination. The *Northern Securities* case, like most Sherman Act cases, involved a voluntary restraint. In that area, the dissenting views of Mr. Justice Holmes have not been followed by the Court. Unquestionably, however, the portion of the Holmes dissent dealing with involuntary restraints—the kind involved in the instant case—properly states the law. He said:

> "Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized, or attempted to monopolize, some portion of the trade or commerce of the realm. See *United States* v. *E. C. Knight Co.*, 156 U.S. 1. All that is added to the 1st section by § 2 is that like penalties are imposed upon every single person who, without combination, monopolizes, or attempts to monopolize, commerce among the states; and that the liability is extended to attempt-

ing to monopolize any part of such trade or commerce. It is more important as an aid to the construction of § 1 than it is on its own account. . . . " 193 U.S. at 404.

Later in the opinion, he stated:

" . . . It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared. . . . " 193 U.S. at 405.

That the Sherman Act applies to "the ferocious extreme of competition with others" has never been doubted. In cases of that character, it makes absolutely no difference whether the predatory behavior is pursued by several firms or by a single firm, provided, of course, that the firm has sufficient power to provide it with an "opportunity for abuse."

The degree of power required is not measured by any fixed mathematical calculation. Although mere size is not an offense against the Sherman Act, " . . . size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past." *United States* v. *Swift & Co.*, 286 U.S. 106, 116 (1932); *Cf. United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 174 (1948).

Only a corporation with the kind of power possessed by Sears could engage in the anti-competitive conduct alleged in the complaint. Sears' power provided it with an opportunity for abuse that has in fact been utilized. The purpose and effect of Sears' plan has been to restrain competition among its suppliers and small competitors.

A decision that such conduct by a corporation of such size is beyond the reach of the Sherman Act should be reviewed by this Court.

2. The Robinson-Patman Act question involves a direct conflict.

The decision of the court below that no private action may be maintained for violation of Section 3 of the Robinson-Patman Act is in square conflict with the decision of the Court of Appeals for the Tenth Circuit in *Vance* v. *Safeway Stores*, decided on November 6, 1956. The *Vance* opinion is set out in full in Appendix C to this Petition.

The question is important and the conflict should be resolved by this Court.

CONCLUSION.

The two questions presented by this petition are closely related. The Attorney General's National Committee to Study the Antitrust Laws has recommended the repeal of Section 3 of the Robinson-Patman Act. This recommendation was made on the assumption that the statute is redundant because predatory price slashing is obviously prohibited by the Sherman Act. In partial explanation of its recommendation, the Committee stated:

> "The prohibition in Section 3 of predatory pricing is legally redundant. Predatory price slashing obviously constitutes an attempt to monopolize, already rendered a crime by Section 2 of the Sherman Act, and an unfair method of competition under Section 5 of the Federal Trade Commission Act." Report, p. 201.

This case presents the Court with a unique opportunity to resolve an important conflict of decision with respect to Section 3 of the Robinson-Patman Act, and, in the same case, to determine the validity of the premise upon which the Attorney General's Committee predicated its recommendation for legislative revision of that statute.

It is respectfully submitted that the questions presented by the petition are of great public importance and merit the attention of this Court.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 11225 SEPTEMBER TERM AND SESSION, 1956.

BRUCE A. MACKEY, Individually, and TIME SAVER TOOLS, INC., *Plaintiffs-Appellants*,

v.

SEARS, ROEBUCK & CO., *Defendant-Appellee*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 1, 1956.

Before DUFFY, *Chief Judge*, and MAJOR and SWAIM, *Circuit Judges*.

DUFFY, *Chief Judge*. The complaint herein containing six Counts was filed by two plaintiffs, Bruce A. Mackey, an individual, and Time Saver Tools, Inc., a corporation, which was wholly owned by Mackey. Hereinafter they shall be referred to as plaintiff.

The gist of the complaint is that since 1949 Sears has directed a course of predatory conduct successively at three business ventures carried on by plaintiff, namely, 1) by localized price cutting which destroyed plaintiff's nursery lamp business; 2) by the use of a threatened boycott, induced a breach of plaintiff's contract to sell on commission certain tools and other products of the Vasco-loy-Ramet Corp., and 3) a destruction by Sears in 1952 of the market for a new type of tool by means of unfair competition. These general charges were distributed

among the six Counts as follows: Count 1 alleges a deliberate and announced plan by Sears to destroy plaintiff's business activities, and asserts such plan is violative of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), and of § 3 of the Robinson-Patman Act (15 U.S.C.A. §13a), and asks treble damages, §15. In Count 2 plaintiff realleges the facts pertaining to the destruction of his business of selling nursery lamps, invokes the court's jurisdiction on the basis of diversity of citizenship, and asks for damages under the common law. Count 3 is a common law cause of action for inducing the breach of plaintiff's commission contract with Vasco-loy-Ramet Corp. by means of a threatened boycott. Count 4 is a common law cause of action for unfair competition with plaintiff's tool business. Count 5 has been abandoned. Count 6 alleges defendant's entire predatory program and conduct was actionable under common law, under practically the same legal theory as Count 2.

On motion of the defendant the claims stated in Counts 1 and 2 were dismissed without leave to amend. The claims contained in Count 3 and in amended Count 4 are at issue in the District Court on the answer filed by Sears.

Plaintiff appealed from the order and judgment dismissing Counts 1 and 2 of the complaint without leave to amend. The defendant moved to dismiss the appeal on the ground that the order and judgment appealed from was not a final or appealable order under the requirements of §1291, Title 28 U. S. Code. This Court, in 218 F. 2d 295, held that the order was final and sustained its jurisdiction to entertain the appeal. The Supreme Court granted certiorari, and in *Sears, Roebuck & Co.* v. *Mackey, et al.*, 351 U.S. 427 the decision of this Court was affirmed.

The question before us on this appeal is whether the District Court was correct in holding that the facts alleged in Counts 1 and 2 of the complaint do not state, and could not be amended to state, a claim upon which relief can be granted.

The complaint alleged Mackey succeeded to the ownership of two "Metalcraft" corporations, since dissolved, which were engaged in the interstate business of making and selling nursery lamps; that Time Saver Tools, Inc., all of whose stock is owned by Mackey, was engaged in the interstate business of manufacturing and selling tools; that defendant Sears is the largest mail order company in the world and also operates over seven hundred retail stores, and that the annual sales of defendant exceed two billion nine hundred million dollars; that the "tremendous volume" of sales gives it the power to destroy the business and property of its small competitors and suppliers through the actual or threatened use of unreasonably low prices.

The complaint alleged Metalcraft began selling nursery lamps to Sears and others in 1945, but in 1946 Sears notified Metalcraft it would discontinue its purchases unless Metalcraft refrained from selling nursery lamps to competitors of Sears, and thereafter Metalcraft sold exclusively to Sears. It further alleged that in 1949 when Metalcraft was under contract to supply Sears with thirty thousand nursery lamps at a price of $2.20 per lamp, Sears instructed Mackey to cause Metalcraft to agree to a 20% reduction in price, and notified Mackey that if such reduction were refused, Sears would ruin Mackey and Metalcraft and make it impossible for Metalcraft to continue in business. The complaint then averred that Mackey refused to agree to such reduction, and Mackey then attempted to promote the sale of said lamps through the department stores in Milwaukee and Detroit, but that Sears, with the specific intent of making it impossible for Metalcraft to dispose of its product, sent substantial quantities of lamps which it had previously purchased from Metalcraft for $2.20 each to Milwaukee and Detroit, but not to comparable cities, to sell in its retail stores at 94 cents each; at the same time Sears listed these lamps in two of its catalogues at a price of 84 cents, and obtained a cheap imitation of Metalcraft's lamps which it misrepresented in its adver-

tising as being lamps manufactured by plaintiff. The complaint avers that the purpose and intent of said sales below cost and such misrepresentation and unfair competition was to destroy the market for Metakraft's products, and that Sears succeeded in such efforts.

The complaint further avers that about September 1, 1951, Mackey entered into a contract with Vascoloy-Ramet Corporation to promote the sale of tools and other products for which he was to be paid a commission of 5%. That after receiving commissions exceeding $5,000.00, Sears demanded that Vascoloy cease paying commissions to Mackey, and advised that unless its demands were complied with and the commission contract terminated, Sears would refuse to make further purchases from Vascoloy or its customers, and Vascoloy thereafter terminated such contract.

The complaint further averred that in April of 1951 Mackey invented a novel type of boring set for use with ¼" electric drills, and that an application for a patent thereon was pending at the time the suit was commenced. In the spring of 1952 Mackey collaborated on the development of a new type of carbide-tipped lathe bit. Time Saver Tools, Inc. was formed to manufacture and sell said boring set, lathe bits and other tools, and national advertising was used to promote the sale of same, and said tools have become identified with Time Saver. The complaint further avers that in December, 1952, Sears purchased carbide-tipped lathe bits which were copies of the bits developed by Mackey, and that it packaged same in practically identical copies of plastic cases which had been used by Time Saver. There were further allegations asserting an attempt by Sears to palm off its product for those manufactured and sold by Time Saver. The complaint then makes the general allegation that the acts and practices set forth in the complaint were performed pursuant to its continuing plan to destroy each and every business in which Mackey was engaged, or might attempt to engage, and that the purpose was to discipline small suppliers and small competitors of Sears so that they would accept any terms that might be dictated by Sears.

The complaint charged that competition among persons who supply products of the kind Sears purchases for resale has thereby been unreasonably restrained.

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states * * *" is illegal. In the case at bar there is no contract in restraint of trade or commerce. No *per se* violation of the Act is alleged. Neither is there present the element of conspiracy as a single corporate entity cannot enter a conspiracy with itself. *Nelson Radio & Supply Co., Inc.* v. *Motorola, Inc.*, 5 Cir., 200 F. 2d 911, 914; *Times-Picayune Publishing Co. et al.* v. *United States*, 345 U.S. 594, 626. We hold Count 1 of the complaint did not state a claim under §1 of the Sherman Act. We do not think *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 7 Cir., 173 F. 2d 79 is *contra*. The question there was whether a conspiracy charge would properly lie where separate and distinct corporate entities were controlled by interlocking directorates, and where various individual defendants were involved in joint activities.

Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the states, or with foreign nations, shall be deemed guilty of a misdemeanor * * *"

Section 2 thus outlaws three practices: 1) attempt to monopolize; 2) combination or conspiracy to monopolize and 3) monopolization. "In order to fall within §2, the monopolist must have both the power to monopolize, and the intent to monopolize." *United States* v. *Aluminum Co. of America, et al.*, 2 Cir., 148 F. 2d 416, 432.[1] The complaint herein does recite an intent by Sears to destroy any business in which the plaintiff might engage and thereby instill fear in its other suppliers, but that allegation cannot be twisted into a charge that Sears

[1] This statement quoted and approved by the Supreme Court in American Tobacco Co. et al. v. United States, 328, U.S. 781, 814.

was attempting to monopolize the market in nursery lamps.

Furthermore, the complaint does not allege a dangerous probability that defendant may achieve a monopoly. *Swift and Company* v. *United States*, 196 U.S. 375, 396; *Lorain Journal Co. et al.* v. *United States*, 342 U.S. 143, 153. The allegation that Sears' total annual business exceeded Two Billion Nine Hundred Million Dollars gives no information as to Sears' volume in the nursery lamp business, either nationally or locally. As the trial court pointed out, there is no factual statement showing the alleged predatory practices have, to the slightest extent, lessened competition in the field of activity in which the plaintiff is engaged. We think the trial court stated the situation well in these words: "* * * The actions taken to ruin the plaintiff and discipline suppliers may be reprehensible but there is not the slightest showing of impending monopoly other than the bare assertion of the pleader." We hold Count 1 of the complaint did not state a claim under §2 of the Sherman Act.

Section 3 of the Robinson-Patman Act, 15 U.S.C. §13a, provides in part: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, * * * to sell * * * goods in any paprt of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or to sell * * * goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

The pertinent allegations of the complaint are, Sears sent lamps which it had purchased from Metalcraft to Milwaukee and Detroit, although not to other comparable cities, for sale below cost, and with the specific intent of making it impossible for Metalcraft to dispose of its products, and as a direct result of Sears' acts, Metalcraft became insolvent; (Par. 14). Sears induced suppliers of lathe-bits to sell the bits to Sears at prices lower than the prices charged Time Saver; (Par. 20). Sears sold

tools in some parts of the United States at lower prices than elsewhere for the purpose of destroying competition from Mackey or Time Saver, (Par. 21).

Defendant Sears argues that unless defendant became a manufacturer of lamps or unless plaintiff became a retailer of merchandise, Section 3 of the Robinson-Patman Act does not apply. Sears insists that when the statute speaks of destroying competition and eliminating a competitor, it means that both parties must be in the same classification. Sears asserts a retailer's conduct cannot be actionable if it merely destroys competition among suppliers.

We think the statute contains no such "definition" as that described by Sears. This Court affirmed a recovery by the plaintiff—Exhibitor against the defendants—distributors in *Milwaukee Towne Corporation* v. *Loew's Inc.*, 7th Cir., 190 F. 2d 561. The Supreme Court held that the conduct of the distillers which restrained competition among wholesalers was actionable under the Sherman Act; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211. Furthermore, the complaint alleges Sears eliminated competition at the retail level for it interfered with the sale of plaintiff's lamps through department stores in Milwaukee and Detroit, and also imitated the packaging of plaintiff's tools in order to take advantage of Time Saver's national advertising and other promotional efforts. We think Sears' conduct as alleged in the complaint was unreasonably anti-competitive in both purpose and effect, and that a claim upon which relief can be granted is stated under Section 3 of the Robinson-Patman Act provided that a private cause of action can exist under that Section. Defendant does contend that private actions for treble damages are not maintainable under Section 3 of the Robinson-Patman Act. However, this important point is very lightly touched upon in the briefs.

There have been no Supreme Court or Court of Appeals decision on this point in any case where the issue was squarely raised and argued. There is, however, a

conflict of authority in the District Courts. The leading case which holds such a cause of action does exist is *Balien Ice Cream Co. Inc.* v. *Arden Farms Co. et al.*, 94 F. Supp. 796 (DC Calif. 1950). The leading case to the contrary is *Vance* v. *Safeway Stores*, 137 F. Supp. 841 (DC N. Mex. 1956). However, this question is thoroughly examined and decided in the case of *Nashville Milk Company* v. *Carnation Company* now pending in this Court, in an opinion being filed simultaneously with this opinion. For the reasons therein stated, we hold that a private cause of action may not be maintained under Section 3 of the Robinson-Patman Act. It follows the trial court was correct in dismissing Count 1 of the complaint.

Count 2 of the complaint incorporates by reference the allegations of paragraphs 12, 13 and 14 of Count 1. It asserts diversity of citizenship, and plaintiff contends the facts set forth a common law cause of action.

Price cutting in and of itself has not been regarded as unlawful under the common law. *Hershel California Fruit Products Co.* v. *Hunt Foods, Inc.*, 111 F. Supp. 732, 734, (DC Calif.); *Schine Chain Theatres, Inc. et al* v. *United States*, 334 U.S. 110, 120. But there are well established exceptions to the rule as where price cutting has been combined with acts of unfair competition such as false or misleading advertising and also where it can be inferred the price cutter was motivated by malice. See *Nims' Unfair Competition and Trade-marks*, 4th Ed. Vol. II, Sec. 300, p. 975.

We think the complaint sufficiently alleges intentional destruction of plaintiff's business without justifiable excuse and based upon malice or ill-will. This constitutes a cause of action under the common law. *Original Ballet Russe* v. *Ballet Theatre*, 2 Cir., 133 F. 2d 187, 189. See also, *Boggs* v. *Duncan-Schell Furniture Co.*, 163 Iowa 166, 143 N.W. 482. The Iowa court quoted from the opinion in *Doremus* v. *Hennessey*, 176 Ill. 608, 615, 52 N.E. 924, 926: "* * * an act maliciously done, with the intent and purpose of injuring another, is not lawful competition."

The trial court was in error in dismissing Count 2 of the complaint.

This cause is remanded for proceedings in conformity with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED. Costs of this appeal to be divided equally between the parties.

UNITED STATES DISTRICT COURT
Chicago 4

May 12, 1954

Re: Bruce A. Mackey, individually, and Time Saver Tools, Inc., an Illinois corporation, *v.* Sears, Roebuck & Co., a New York corporation

53 C 1240

MEMORANDUM.

The issues in this case arise on the defendant's motion to dismiss the complaint, except Count III, to which an answer has been filed.

The complaint is brought by Bruce Mackey and Time Saver Tools, Inc., a corporation, against Sears, Roebuck & Co. and consists of six Counts.

Count V is brought under Section 2(f) of the Robinson-Patman Act (15 U. S. C. Sec. 13(f)) interdicting the receipt of a prohibited price discrimination. This Count is admittedly deficient under Automatic Canteen Co. *v.* Federal Trade Commission, 346 U. S. 61, decided since the complaint was filed.

Count I presents a claim for treble damages under the anti-trust laws and Counts II, IV and VI aver common law causes of action. The statutory and the common law claims will be considered separately.

The Claim for Treble Damages—Count I.

This Count is brought on behalf of Mackey alone and purports to charge conduct offending Sections 1 and 2 of the Sherman Act and Section 3 of the Robinson-Patman Act (U. S. C. Secs. 1, 2, 13(a)). The factual allegations are as follows:

(a) Mackey, as sole surviving stockholder, succeeded to the ownership of all of the rights of two "Metalcraft" corporations, since dissolved, which were engaged in the interstate business of making and selling nursery lamps. (Par. 3)

(b) The plaintiff Time Saver Tools, Inc. is engaged in the interstate business of manufacturing and selling tools. All of its stock is owned by Mackey. (Par. 5)

(c) Sears is engaged in general retail merchandising, selling nursery lamps and tools, among other items. It is the largest mail order company in the world and additionally operates over 700 retail stores in the United States and some foreign countries. The business of Sears is interstate. Its sales are presently at a rate of over $2,900,000,000 yearly. The "tremendous volume" of Sears gives it power to destroy the business and property of its small competitors and suppliers through refusals to deal with such suppliers or through the actual or threatened use of unreasonably low prices. Sears has used its power "to discipline and punish suppliers" with the specific intent to injure and destroy potential competitors who made purchases from such suppliers. The exercise of such power constitutes an intent to monopolize a part of interstate trade and has the effect of unreasonably restraining competition among suppliers and of coercing suppliers of Sears to deal with it on Sears' terms. (Par. 8-10)

(d) Beginning in 1949 Sears has engaged in a continuing attempt to destroy every business in which Mackey was engaged in order to punish him for his refusal to deal on Sears' terms and to restrain others from similar refusals. (Par. 11)

(e) In 1946 Sears by threatening to discontinue its purchases caused Metalcraft to sell its nursery lamps exclusively to Sears. (Par. 12)

(f) In 1949 Sears notified Mackey that it would not accept 30,000 nursery lamps which Metalcraft was under contract to supply unless the price was reduced 20% declaring that if the reduction were refused Sears would ruin Mackey and Metalcraft. (Par. 13)

(g) Mackey declined to accede to the price reduction and thereupon attempted to sell the nursery

lamps through department stores in Milwaukee and Detroit. With the intent of despoiling Mackey's plans, Sears sent substantial quantities of the Metalcraft lamps, for which it had paid $2.20 apiece, for sale in Milwaukee and Detroit at 94¢, though not in other comparable cities. At the same time Sears listed the lamps in two of its catalogs at 84¢ apiece, supplying a cheap imitation of the Metalcraft lamps "to persons ordering from Sears' catalog representation of Metalcraft's lamp." As a direct result of such conduct, Metalcraft became insolvent and was dissolved. (Par. 14)

(h) In October 1952, while Mackey was engaged in selling tools for Vascoloy, Sears caused Vascoloy to discharge Mackey under the threat of refusing to make further purchases from customers of Vascoloy. (Par. 15, 16)

(i) Time Saver was formed to manufacture and sell certain new type tools devised in part by Mackey. Through national advertising such tools became identified with Time Saver in the market. (Par. 17)

(j) Sears is presently purchasing and selling tools which are copies of the tools developed by Mackey in plastic cases which are copies of the cases used by Time Saver. The Sears case contains the same legend and design on its display surface but the words "Craftsman" and "Sears, Roebuck and Co." are substituted for the words "Time Saver Tools, Mundelein, Ill." Sears' purpose is to appropriate the market for the tools and at the same time to destroy Mackey. With respect to certain tools, Sears' conduct continued notwithstanding notice of Time Saver's patent application and despite knowledge that Sears' copies infringe on the invention embodied in the patent application. (Par. 18, 19)

(k) Through promises of future business Sears has been able to purchase tools from Time Saver's supplier at prices lower than the price charged Time Saver and has sold the tools below manufacturing

cost for the purpose of appropriating the market and destroying Time Saver. (Par. 20)

(l) Sears has sold tools in some parts of the United States at prices lower than others for the purpose of destroying competition from Mackey or Time Saver. (Par. 21)

(m) The described practices were undertaken by Sears in order to destroy Mackey and constitute an attempt to monopolize interstate commerce engaged in by Mackey and small companies making sales to Sears or which would be competitors of Sears in the retail market.

As a result of the alleged injustices, Mackey demands treble damages in the amount of $570,000, together with incidental and injunctive relief. Time Saver does not join in the prayer for relief under this Count.

Discussion of the Sherman Act

So far as the Sherman Act is concerned, it is implicit in the plaintiff's brief that only a Section 2 violation is urged. No reliance is placed on Section 1. This is inevitable, since there is no charge of combination or conspiracy among distinct legal entities having separate economic motives, personal to themselves, which is an indispensable requisite for a Section 1 violation.

Times-Picayune *v.* United States, 345 U.S. 594, 626.

Timken Roller Bearing Co. *v.* United States, 341 U. S. 593, 598, 606.

Nelson Radio & Supply Co. *v.* Motorola, 200 F. 2d 911, 914 (C. C. A. 5th Circ. 1952)

United States *v.* Yellow Cab Co., 332 U. S. 218, 227.

To justify a suit for treble damages (15 U. S. C. Sec. 15) two conditions must concur. The plaintiff must establish (a) a violation of the anti-trust laws and (b) injury to the plaintiff proximately resulting from the established violation.

Goodman & Son *v.* United Lacquer Mfg. Corp., 81 F. Supp. 890 (D. C. Mass. 1949)
Sunbeam Corporation *v.* Payless Drugstores, 113 F. Supp. 31 (D. C. Cal. 1953).
Nelson Radio & Supply Co. *v.* Motorola, supra.

The Sherman Act decries conduct unreasonably restricting competition in the public market and a charge of transgressing the statute necessarily involves a public evil as distinguished from a purely private wrong.

Neumann *v.* Bastian-Blessing Co., 70 F. Supp. 447 (D. C. Ill. 1947, LaBuy, D. J.).

The factual requirements for a civil suit are no less severe than the requirements for a criminal indictment. Plaintiff argues that it is absurd to suggest that the public has no interest in an individual who is being deliberately destroyed. Assuredly the thought is valid but it serves no purpose in enlarging the scope of the statute.

Our initial task, therefore, is to determine whether Count I sufficiently describes an offense under Section 2 of the Sherman Act.

Rule 8(a) prescribes that a complaint shall include "a short and plain statement of the claim showing that the pleader is entitled to relief" to which is added the direction that each averment "shall be simple, concise and direct." While a cause of action need not be stated with the technical accuracy and completeness required at common law, the pleading must make it evident, at least in a practical way, that the pleader is entitled to relief.

Commercial Banking Corp *v.* Indemnity Insurance Company of North America, 1 F. R. D. 380 (D. C. Pa. 1940).

The broad tolerance of the Rules does not extend to justify the allegation of a claim in the words of a statute and this is especially true in the case of a statute like the Sherman Act which defines a social and economic offense

in terms of a general principle without specific tests to aid in its application.

> Louisiana Farmers' Protective Union *v.* Great Atlantic and Pacific Tea Co., 131 F. 2d 419 (C. C. A. 8th 1942).

The degree of definition required in alleging ultimate facts varies from one type of case to another, but invariably enough of a factual nature related to the specific occurrences constituting the claim must be included to indicate that a cause of action is at least potentially present. Unless this test is met, the conduct of a trial would be a pointless waste of time.

The problem, therefore, is whether Count 1, viewed in this liberal aspect, states a case within Section 2 of the Sherman Act.

Section 2 has a dual aspect. It condemns both the act of monopolizing and an attempt to monopolize. As support for the monopoly charge, the complaint alleges that the defendant Sears is engaged in general retail merchandising, selling among other items nursery lamps and tools, and that its current annual business exceeds $2,900,000,000. These allegations are manifestly insufficient to establish monopoly or monopoly power.

In United States *v.* Columbia Steel Company, 34 U. S. 495, 527, the Court said:

> "In determining what constitutes unreasonable restraint, we do not think the dollar volume is of itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the pur-

chase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed.

United States *v.* United Shoe Machinery Corp., 110 F. Supp. 295 (D.C. Mass. 1953).

In the instant case there is no statement as to Sears' volume in the nursery lamp and tool business, either nationally or locally, or any factors relating to the opportunities of the public to purchase in a free and unrestrained market. Sears' volume in other fields is clearly irrelevant. There is no factual statement showing that the predatory practices complained of have to the slightest extent lessened competition in the field of activity in which the plaintiff was engaged. The effectiveness of exclusionary practices employed against a single competitor cannot be held to be monopolization where others in the same field are numerous and active. The destruction of the plaintiff alone would in no sense deprive other competitive entities of their market or affect the public to any measurable extent.

Neumann *v.* Bastian-Blessing Co., supra.

The other aspect of Section 2 which has pertinency is the interdiction of an "attempt to monopolize." The classical definition of Mr. Justice Holmes is immediately pertinent. In Swift & Co. *v.* United States, 196 U. S. 375, 396, he said:

> "The statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. Common-

wealth *v.* Peaslee, 177 Massachusetts 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

This definition has received recent approval.

Lorain Journal *v.* United States, 342 U. S. 143, 193.

Since the complaint makes no showing that Sears had achieved an actual monopoly or had attained monopoly power in the field and in the area in which the plaintiff was engaged, it becomes pertinent to inquire whether the predatory practices described coupled with the economic strength possessed by Sears imply "an intent to monopolize a part of interstate trade" and afford evidence of a dangerous probability that a monopoly will ultimately be accomplished. The complaint can be searched in vain for any factual or near factual allegations that bring any such conviction to the mind.

Specifically the defect in the complaint is the absence of any causal connection between the destruction of the plaintiff and his corporations and the disciplining of Sears' suppliers on the one hand, and the elimination or degrading of general competition in the areas of business in which Sears and the plaintiff had a common interest on the other hand. The actions taken to ruin the plaintiff and discipline suppliers may be reprehensible but there is not the slightest showing of impending monopoly other than the bare assertion of the pleader.

It is true that an offensive monopoly need not be nation-wide. It may indeed embrace only a small locality. As stated by Mr. Justice Reed in United States *v.* Columbia Steel Co., 334 U. S. 495, 519:

"The Sherman Act is not limited to eliminating restraints whose effects cover the entire United States. We have consistently held that where the relevant

competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area."

United States v. Yellow Cab Co., 332 U. S. 218.
Gamco Inc. v. Providence Fruit & Produce Co., 194 F. 2d 484 (C. C. A. 1st 1952), where the monopoly operated within the confines of a single building.

However, the charge that Sears undersold the plaintiff in Milwaukee and Detroit is not sufficient to establish any destructive effect on the competition in those areas or any exclusionary practices.

Price cutting in itself is not inherently unlawful.

Schine Theatres v. United States, 334 U. S. 110, 120.

There is no charge that Sears and the plaintiff were the only vendors of nursery lamps in the two cities or any allusion to the financial strength or weakness of any other competitors who may have been engaged in those markets, or indeed any other allegations descriptive of a competitive situation in which the public interest was involved. All of the factual allegations emphasize the plaintiff as the primary object of Sears' destructive intent.

Both sides converge upon United States v. New York Great Atlantic and Pacific Tea Company, 67 F. Supp. 626 (D. C. Ill. 1946), affirmed 173 F. 2d 79, as being the most closely related decision. The defendant asserts that this case stands alone as sustaining a monopoly charge where no dominating control of the market was proved, yet defendant offers no citations to authoritative cases where the decision has been criticized, limited or rejected. It is not necessary to justify this decision, although it is easily defensible and undoubtedly sound. So far as the case relates to Section 2 of the Sherman Act, it was presented to the court as an attempt to create a partial monopoly and a conspiracy between the principal defendant and its associated companies was charged. There was no contention

that an actual monopoly had been accomplished and therefore the decision was based upon a different aspect of Section 2 from the group of cases, stressed by the defendant, in which the Supreme Court has measured the percentage of the business transacted by the offending corporation in the particular field of competition. The court found that where, in spite of a declaration of innocence of purpose the "conscious acts of a group are such as inevitably to work undue restraint of trade or a monopoly, in whole or in part, the actors thereby bring about transgression of the congressional rule of conduct." (p. 676. Emphasis supplied.) The court concluded that A. & P.'s plan of action consisting of numerous and divers restrictive practices inevitably and inherently tended to restrain trade and create a partial monopoly. Even though some one or all of the acts of A. & P. standing alone might not amount to a violation of law, "when coupled and inextricably interwoven with the activities of Acco, (such actions) reflect inevitably the misuse of defendants' power in competition with others to such an extent as to create undue interference with commerce—undue restraint of trade—of such a character as to result in monopoly."

The separate and successive acts of the defendant factually recited in the first Count were invariably directed toward the elimination of the plaintiff alone, and therefore bear no real analogy to the impairment of the public interest proved in the A. & P. case.

The charge of the Sherman Act violation cannot be sustained.

The Claim Under Section 3 of the Robinson-Patman Act (15 U. S. C. 13(a))

The second anti-trust violation seriously urged is an offense under Section 3 of the Robinson-Patman Act. So far as pertinent, this section provides:

> "It shall be unlawful for any person * * * to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the

effect of such discrimination may be substantially to lesson competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *."

The pertinent allegations of the complaint are:

(a) Paragraph 14, Sears sent lamps which it had purchased from Metalcraft to Milwaukee and Detroit, though not to other comparable cities, for sale below cost.

(b) Paragraph 20. Sears induced suppliers of lathe bits to sell the bits to Sears at prices lower than the prices charged Time Saver.

(c) Paragraph 21. Sears sold tools in some parts of the United States at lower prices than elsewhere for the purpose of destroying competition from Mackey or Time Saver.

In the light of what has been said under the discussion of the Sherman Act, the only clause of Section 3 of the Robinson-Patman Act which is significant here is that which specifies that price discrimination is unlawful if it tends to injure, destroy or prevent competition with the person who grants or receives the benefit of the discrimination or with the customers of either. To succeed plaintiff must bring himself within the defined area of competition in order to show that he has been injured as a result of an infraction of the section.

Goodman & Son *v.* United Lacquer Mfg. Corp., supra.
Nelson Radio & Supply Co. *v.* Motorola, supra.
Sunbeam Corporation *v.* Payless Drug Stores, supra.

Manifestly Mackey was not a person who granted or received any price concession or a customer of Sears or its customers. This disposes of the allegations in Paragraphs 14 and 21 with finality.

The charge in Paragraph 20 that the common supplier of lathe bit sets to Sears and Mackey sold to Sears at a lower price than Time Saver is irrelevant since Time Saver is not a party plaintiff to Count I. Further, the supplier of the bits—not Sears—is the offender described by the statute, and if any such cause of action is sustainable the supplier should necessarily be joined as a primary party defendant. Finally, the emasculated allegations of Section 20 hardly conform even to the simple requirements of Rule 8.

Count II—Common Law Cause of Action.

Mackey is the sole party plaintiff in Count II. Plaintiff seeks to justify this Count as a common law action for the intentional and deliberate destruction of the plaintiffs' businesses, accomplished through a planned program which, the plaintiff says, must be considered as a connected whole. The action, therefore, sounds in tort.

The substantial facts alleged are (1) Sears induced Metalcraft to sell its nursery lamps to Sears exclusively, (2) Sears refused to accept lamps which Metalcraft was under contract to supply Sears and demand price reductions under threat that Sears would ruin Mackey and Metalcraft if the reduction were refused, and (3) Sears sold Metalcraft the lamps below cost in Milwaukee and Detroit constituting markets which Metalcraft was attempting to develop.

A corporation has the right to select its customers and to refuse to sell its products for any reason whatsoever.

Times-Picayune *v.* United States,
supra
Nelson Radio & Supply Co. *v.* Motorola,
supra

The right arbitrarily to refuse to deal with or purchase from anyone should be equally immune from attack or criticism.

Price cutting is not inherently unlawful.

Schine Theatres *v.* United States,
supra, at 120
United States *v.* New York Great Atlantic & Pacific Tea Co.,
supra, at 642

No fraudulent practices are alleged. The sole impropriety charged is that Sears notified Mackey he would be ruined if he refused to accede to a price reduction. Such purpose not identifiable in some objective way with acts which are in and of themselves lawful does not render the conduct actionable.

Count IV—Common Law Action for Unfair Competition

This Count is brought by Time Saver as the sole plaintiff. The essence of the charge is that Sears was guilty of unfair competition in that it copied unpatented tools (applications for patents were pending) and the case in which the tools were presented to the public which were designed and offered for sale by Time Saver, the words "Craftsman" and "Sears, Roebuck & Co." were imprinted on the package offered to the public by Sears.

Suffice it to say that the complaint contains no allegations from which it could be concluded that any reasonably intelligent and alert member of the public was deceived into purchasing Sears' tools believing they were the products of Time Saver.

Plaintiff relies upon several cases of which Quaker Oats Co. *v.* General Mills, Inc., 134 F. 2d 429, decided in this Circuit is typical. Two excerpts from Judge Minton's opinion make it unmistakably clear that the claimed cause of action cannot be sustained. At page 431 the court said:

> "The plaintiff was bound to use reasonable care in the marketing of its product to see that the public was informed of the source thereof, and to so identify its product as to make it readily distinguishable from the defendant's product."

And again at Page 432

> "The plaintiff, in marketing its goods, is not bound to make them 'foolproof' so that no one can make a mistake in regard thereto."

Unless it were shown that the plaintiff's product had acquired a secondary meaning identifying the product with the plaintiff, there wwould be no basis for asserting that the public was misled even though the package and its contents offered by Sears were identical with that of Time Saver. Count IV is also deficient in this respect.

Count VI—Omnibus Count at Common Law

This Count is brought by Mackey alone. In effect it duplicates all of the preceding Counts except Count I and charges the practices of Sears were performed in furtherance of its plan to destroy Mackey and his businesses.

In view of the position herein expressed on Counts II, IV, and V, obviously most of the allegations are superfluous and at best background or evidentiary material. The defendant concedes that that portion of Count VI which duplicates Count III is sustainable. The defendant has sought the elimination of neither Count III or Count VI on the basis of duplication. No charge or prejudice to the defendant, if both Counts are permitted to stand, has been urged and none is perceivable. Under these circumstances and in view of this court's liberal attitude on questions of pleadings, the motion to strike Count VI is denied.

The problem as to Whether an Amendment Should be Allowed

This case has been argued extensively and with great skill. There is nothing in the pleading to indicate that any supplemental allegations would establish a monopoly or monopoly power by Sears in the field and localities in which the plaintiff conducted his several businesses, or that the alleged wrongful practices of Sears affected the

open and public market in such a way as to lay a foundation for a supportable charge of an attempt to monopolize. In respect to Section 3 of the Clayton Act the circumstances recited do not coincide with the requirements of the law. Therefore, leave to amend the complaint under the anti-trust laws will be denied.

The allegations of Count II are not suggestive of practices a fuller or correct statement of which would constitute a cause of action, and therefore, leave to amend in respect to this claim will be denied.

As to Count IV, the situation is somewhat different. Supplementing the Count with allegations showing that the lathe bit package had become identified with Metalcraft in the public mind and that the Sears package was deceptively the same, notwithstanding the imprint of Sears' own trade name, would supply the existing deficiencies, and therefore leave to amend the claim for unfair competition would be in order.

In net, Counts I, II, IV and V will be stricken with leave to amend Count IV and without leave to amend Counts I, II and V.

Counsel will confer and present a draft order not inconsistent with the views herein expressed within five days from the date hereof.

Julius J. Hoffman
Judge

And afterwards on, to wit, the 13th day of May, 1954, there was filed in the Clerk's office of said Court a certain Memorandum Of The Court in words and figures following, to wit:

UNITED STATES DISTRICT COURT
Chicago 4

Chambers of
Judge Julius J. Hoffman

May 13, 1954

Re: Bruce A. Mackey, individually, and Time Saver Tools, Inc., an Illinois corporation, *v.* Sears, Roebuck & Co., a New York corporation 53 C 1240

MEMORANDUM

Counsel for the defendant have called the Court's attention to the inadvertent quotation of Section 13 instead of Section 13a, Title 15, U. S. C., appearing on page 9 of the memorandum filed by the Court on May 12, 1954. The memorandum is therefore amended to provide for the substitution of Section 13a for Section 13, as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

Julius J. Hoffman
Judge

APPENDIX B.

Section 1 of the Clayton Act (15 U. S. C. §12):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws", as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes'", approved February twelfth, nineteen hundred and thirteen; and also this Act. . . .

Section 4 of the Clayton Act (15 U. S. C. §15):

Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 3 of the Robinson-Patman Act (15 U. S. C. §13a):

Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any dis-

count, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

Section 1 of the Sherman Act (15 U.S.C. §1):

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act (15 U.S.C. §2):

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

APPENDIX C.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5366—September Term, 1956

Harry V. Vance, Trustee in Bankruptcy for Frank Melvin Thompson, Bankrupt,
Appellant,
v.
Safeway Stores, Incorporated, a corporation,
Appellee.

Appeal from the United States District Court for the District of New Mexico.

(November 6, 1956)

Before HUXMAN, MURRAH and PICKETT, *Circuit Judges.*

PICKETT, *Circuit Judge.*

The Trustee in Bankruptcy for Frank Melvin Thompson brought this action against Safeway Stores, Inc., to recover treble damages under §3 of the Robinson-Patman Act, (15 U.S.C.A. §13a).[1] The complaint is based solely

[1] §13a reads as follows:

"Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties.

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like goods, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both. June 19, 1936, c. 592, §3, 49 Stat. 1528."

upon violations of the second and third clauses of §3, wherein it is alleged that Safeway made sales at unreasonably low prices and territorial discrimination in prices for the purpose of injuring competition to the damage of Thompson, who at the time was in the retail grocery business in Albuquerque, New Mexico. It suffices to say that the allegations, if true, constituted violations of §3. The trial court expressed doubt as to the constitutionality of §3, but chose to base its conclusion on a holding that the section was no part of the antitrust statutes of the United States, and dismissed the action on the ground that a civil action for treble damages was not available to a private litigant under 15 U.S.C.A. §15. We do not agree with this conclusion.

15 U.S.C.A. §15 was included in the Clayton Act (38 Stat. 730), and provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, * * *" together with reasonable attorney's fees and costs. The Clayton Act defined "antitrust laws" as designated statute existing at the time. Upon codification this section became 15 U.S.C.A. §12, and defined "antitrust laws" as sections 1-27 of Title 15. It is contended that §13a was not one of those antitrust laws as defined in §1 of the Clayton Act and the codifiers could not amend the law by including it in §12. This is no doubt true if §3 is a separate act. The code is only *prima facie* evidence of the law, and the language of the original statute controls. Act creating U.S. Code, U.S.C.A. Vol. 1, p. 4; *Stephan* v. *United States*, 319 U.S. 423; *Murrell* v. *Western Union Tel. Co*, 5 Cir. 160 F.2d 787. If, however, §3 is in fact an amendment to the Clayton Act, it was properly designated in the codification. To be an amendment to an existing law, the statute need not be so labeled. A law is amended when it is permitted to remain and something is added or taken from it or is in some way changed or altered to better accomplish its purpose. *United States* v. *Lapp*, 6 Cir., 244 Fed. 377; *Balian Ice Cream Co.* v. *Arden Farms Co.*, 94 F. Supp. 796.

In holding that §3 was not an amendment to the Clayton Act but a separate Act for which a civil remedy was not available to the plaintiff under §15, the trial court relied to a large extent upon the legislative history of the Act. Safeway here insists that the history sustains the trial court, while the Trustee maintains the opposite view. We think a study of the committee reports, the discussions and debates on the Robinson-Patman Act, both in the House and Senate, leads to the conclusion that it was generally understood at the time that §3 of that Act was supplementary and amendatory of the antitrust laws and that in addition to the criminal sanctions, an injured party could recover treble damages under the provisions of the Clayton Act. The Act dealt exclusively with the subject matter of the existing antitrust laws. It was a continuation of the Congressional attack upon the evils of combinations, monopolies and restraints of trade and commerce designed to stifle competition. In each instance "Congress was dealing with competition which it sought to protect, and monopolies which it sought to prevent". *Standard Oil Co.* v. *United States*, 340 U.S. 231, 249; *Staley Mfg. Co.* v. *Federal Trade Commission*, 7 Cir., 135 F.2d 453. The title to the Act states that it is an act to amend §2 of the Clayton Act, and for other purposes, but the enacting clause recites only that §2 "is amended to read as follows:" and the entire Robinson-Patman Act follows, although the first section, designated as §2, is in quotation marks, while the last three sections are not. We do not think that failure to include the last three sections in quotation marks has the significance which the trial court gave to it, because these sections are not referred to in any other manner than in the enacting clause. Without specific language excluding these three sections from the enacting clause, we feel constrained to hold that they are included thereunder and must be considered as amending the Clayton Act.

In *Balian Ice Cream Co.* v. *Arden Farms Co.*, *supra*, Judge Yankwich, in a thorough and painstaking review of anti-trust legislation and the authorities, concluded that

§3 was an amendment of the Clayton Act and upheld the right of a private litigant to sue for treble damages under §15. We adopt the reasoning and conclusions reached in that case. Generally the courts which have had occasion to consider the question have agreed that the recovery of treble damages was available to private litigants for violation of §13a. *Atlanta Brick Co.* v. *O'Neal*, (D.C.E.D. Tex.) 44 F.Supp. 39; *A. J. Goodman & Son* v. *United Lacquer Mfg. Corp.*, (D.C. Mass.) 81 F.Supp. 890; *Spencer* v *Sun Oil Co.* (D.C. Conn.) 94 F.Supp. 408; *Myers* v *Shell Oil Co.* (D.C.S.D. Calif., Cen. Div.) 96 F.Supp. 670; *Hershel Calif. Fruit Prod. Co.* v. *Hunt Foods*, (D.C.N.D. Calif. S.D.) 119 F.Supp. 603, appeal dismissed 9 Cir., 221 F.2d 797. In *National Used Car Market, Inc.* v. *Nat'l. Auto Dealers Ass'n.* (D.C., D.C.) 108 F.Supp. 692, the District Court was inclined to the view that §3 did not provide a civil remedy for damages, but did not so hold. The action was dismissed on other grounds and affirmed, 200 F.2d 359.

Although it was not necessary to a decision in the case, the Supreme Court, in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 750, had this to say:

> "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction a violator may be fined or imprisoned. 49 Stat. 1528, 15 U.S.C. §13a. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. 38 Stat. 731, 15 U.S.C. §15. This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress."

Considering the result in *Moore* v. *Mead's Fine Bread Co.*, 10 Cir., 184 F.2d 338, vacated and remanded 340 U.S.

945; and 208 F.2d 777, reversed 348 U.S. 115,[2] and what was said in the *Bruce's Juices* case, without further word from the Supreme Court, we would be extremely hesitant to hold that a valid judgment for treble damages could not be had for violations of §13a.

REVERSED.

[2] In the Mead Bread case, as in this case, the plaintiff sought treble damages for violations of §13a. We first sustained a dismisal of the complaint. Upon mandate from the Supreme Court, this judgment was vacated and the case was tried to a jury which returned a verdict in favor of Moore for treble damages. We reversed and remanded with instructions to enter judgment for the defendant. The Supreme Court reversed and affirmed he judgment of the District Court. Although the question here was not raised, the court held that violations of §13a were "included within the scope of the antitrust laws" with th ght to treble damages, even though the victim is a local reside .d no interstate transactions were used to destroy it.